

(e) *Written statements of direct testimony.* (1) Except as provided in paragraph (e)(2) of this section, each party must exchange with all other parties a written narrative verified statement of the oral direct testimony that the party will provide at any hearing to be conducted by telephone; the direct testimony of each employee or agent of the party that the party will call to provide oral direct testimony at any hearing to be conducted by telephone; and the direct testimony of each expert witness that the party will call to provide oral direct testimony at any hearing to be conducted by telephone. The written direct testimony of witnesses shall be exchanged by the parties at least 10 days prior to the hearing. The oral direct testimony provided by a witness at a hearing conducted by telephone will be limited to the presentation of the written direct testimony, unless the presiding officer finds that oral direct testimony which is supplemental to the written direct testimony would further the public interest and would not constitute surprise.

(2) The parties shall not be required to exchange testimony in accordance with this paragraph if the hearing is scheduled to begin less than 20 days after the presiding officer's notice stating the time of the hearing.

(f) *Evidence—(1) In general.* The testimony of witnesses at an oral hearing shall be on oath or affirmation and subject to cross-examination. Any witness other than a party may be examined separately and apart from all other witnesses, in the discretion of the presiding officer. The presiding officer shall exclude evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort on which responsible persons are accustomed to rely, insofar as practicable.

(2) *Objections.* If a party objects to the admission of any evidence or to the limitation of the scope of any examination or cross-examination or to any other ruling of the presiding officer, such party shall state briefly the grounds of such objection, and the presiding officer shall rule on it. The transcript or recording shall include argument or debates on objections, except as ordered by the presiding officer, and shall include the ruling of the presiding

officer. Objections not made before the presiding officer may not subsequently be relied on in the proceeding.

(3) *Offer of proof.* Whenever evidence is excluded by the presiding officer, the party offering such evidence may make an offer of proof. The offer of proof shall consist of a brief statement, which shall be included in the transcript or recording, describing the evidence excluded. If the evidence consists of a brief oral statement, it shall be included in full in the transcript or recording. If the evidence consists of an exhibit, it shall be marked for identification and inserted in the record. In either such event, if the judicial officer decides that the presiding officer's ruling in excluding the evidence was erroneous and prejudicial, such evidence shall be considered a part of the record. If the taking of such evidence will consume a considerable length of time at the hearing, the presiding officer shall not allow the insertion of such evidence in full and, if the judicial officer decides that the presiding officer's ruling in excluding the evidence was erroneous and prejudicial, the hearing shall be reopened to permit the taking of such evidence.

(4) *Depositions and affidavits.* Except as is otherwise provided in these rules, admission of the deposition of any witness shall be subject to the provisions of rule 9, § 202.109, and affidavits, and statements under penalty of perjury as provided in 28 U.S.C. 1746, Pub. L. 94-550, may be admitted only if the evidence is otherwise admissible and no party objects.

(5) *Department records.* A true copy of any written entry in any record of the Department, made by an officer or employee of the Department in the course of the official duty of such officer or employee, and relevant to the issues involved in the hearing, shall be admissible as prima facie evidence of the facts stated in the record of the Department, without the production of such officer or employee.

(6) *Exhibits.* (i) For each exhibit offered by a party, copies in addition to the original shall be filed with the presiding officer for the use of all other parties to the proceeding, except where the presiding officer finds that the furnishing of copies is impracticable. The

presiding officer shall tell the parties the number of copies required to be filed, make the proper distribution of the copies, and have this noted on the record.

(ii) If the testimony of a witness refers to any document, the presiding officer shall determine whether it shall be produced at the hearing and made a part of the record as an exhibit, or whether it shall be incorporated in the record by reference.

(iii) If relevant and material matter is embraced in a document containing irrelevant or immaterial matter, such irrelevant or immaterial matter shall be designated by the party offering the document in evidence, and shall be segregated and excluded, insofar as practicable.

(g) *Subpoenas*—(1) *Issuance*. The attendance and testimony of witnesses and the production of documentary evidence, from any place in the United States, on behalf of any party to the proceeding, may be required by subpoena at any designated place for oral hearing. Subpoenas may be issued by the presiding officer, on a written application filed by a party, showing the grounds and necessity thereof, and, with respect to subpoenas for the production of documentary evidence, showing their competency, relevancy, and materiality and the necessity for their production. Subpoenas may be issued on the motion of the presiding officer.

(2) *Service; proof of service*. A subpoena may be served by any natural person over the age of 18 years. The party at whose instance a subpoena is issued shall be responsible for serving it, however, at the request of such party the Secretary will attempt to serve it.

(h) *Oral argument*. The presiding officer shall permit oral argument by the parties or their counsel who are present at an oral hearing, but may limit such argument to any extent that the presiding officer finds necessary for the expeditious or proper disposition of the case.

(i) *Transcript or recording*. (1) Hearings to be conducted by telephone shall be recorded verbatim by electronic recording device. Hearings conducted by audio-visual telecommunication or the personal attendance of any individual

who is expected to participate in the hearing shall be transcribed, unless the presiding officer finds that recording the hearing verbatim would expedite the proceeding and the presiding officer orders the hearing to be recorded verbatim. The presiding officer shall certify that to the best of his or her knowledge and belief any recording made pursuant to this paragraph with exhibits that were accepted into evidence is the record of the hearing.

(2) If a hearing is recorded verbatim, a party requests the transcript of a hearing or part of a hearing, and the presiding officer determines that the disposition of the proceeding would be expedited by a transcript of the hearing or part of a hearing, the presiding officer shall order the verbatim transcription of the recording as requested by the party.

(3) Parties to the proceeding who desire copies of the transcript or recording of the oral hearing may make arrangements with the reporter, who will furnish and deliver such copies direct to such parties, upon receipt from such parties of payment for the transcript or recording, at the rate provided by the contract between the reporter and the Department for such reporting service.

(j) *Filing, and presiding officer's certificate, of the transcript or recording*. As soon as practicable after the close of the oral hearing, the reporter shall transmit to the presiding officer the original transcript or recording of the testimony, and as many copies of the transcript or recording as may be required by paragraph (j) of this section for the area offices of the Agency and as may be required for the Washington office of the Agency. At the same time the reporter shall also transmit a copy of the transcript or recording to each party who shall have arranged and paid for it, as provided in paragraph (h) of this section. Upon receipt of the transcript or recording, the presiding officer shall attach to the original transcript or recording a certificate stating that, to the best of the presiding officer's knowledge and belief, the transcript or recording is a true, correct, and complete transcript or recording of the testimony given at the hearing and that the exhibits mentioned in it are